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In the Supreme Court of the United States

OCTOBER TERM, 1939

HARRY H. NEUBERGER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR REHEARING OF PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 548

HARRY H. NEUBERGER, PETITIONER

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GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR REHEARING OF PETITION FOR CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

Petitioner filed a petition for rehearing of its petition for certiorari on the ground that there is a case entitled *Central Hanover Bank & Trust Co.* v. *United States,* now pending in the Court of Claims, which involves the same question as that decided in this case. Petitioner requested the Court to defer consideration of the petition for rehearing until the decision of the Court of Claims in the *Central Hanover* case.

In a Supplemental Memorandum in support of the petition for rehearing, petitioner sets forth that

on February 5, 1940, the Court of Claims decided the case of *Craik* v. *United States,* which is alleged to be in conflict with the decision below and to foreshadow a decision in favor of the taxpayer in the *Central Hanover* case. Petitioner urges that the decision in the *Craik* case warrants the grant of certiorari now without waiting for the decision in the *Central Hanover* case.

Neither the petition for rehearing nor the Supplemental Memorandum reveals that the precise question involved in the present case was decided against petitioner's position by the Court of Claims less than a month prior to the decision in the *Craik* case. *Mosbacher* v. *United States,* decided January 8, 1940.[1] The opinion in the *Mosbacher* case was written by Judge Whitaker who also wrote the opinion in the *Craik* case, the decision was unanimous, and the court expressly reaffirmed its decision in *Klingenstein* v. *United States,* 18 F. Supp. 1015, certiorari denied, 302 U. S. 716, a case which is also directly contrary to petitioner's position.

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[1] The court stated: "In this case plaintiff seeks to offset certain losses which he claims he sustained in trading on the New York Curb Exchange against his profits therefrom. The issue is whether the losses were sustained by him individually or by an alleged partnership or joint venture of which plaintiff was a member. The answer depends on whether or not the association between plaintiff and certain men named Greenstein, Stern, and Schwartz was a partnership or joint venture or whether these men were employees of the plaintiff in the carrying out of the enterprise. If employees, the plaintiff is entitled to the deduction; if partners or associates in a joint venture, he is not. *Joseph Klingenstein* v. *United States*, 85 Ct. Cls. 165, 18 F. Supp. 1015; *Percy H. Johnston* v. *Commissioner*, 86 F. (2d) 732."

Neither the *Klingenstein* nor the *Mosbacher* case was overruled in the *Craik* case; to the contrary, the *Klingenstein* case was specifically distinguished. Under these circumstances, there is no warrant for believing that the *Craik* decision foreshadows a decision favorable to the taxpayer in the *Central Hanover* case.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

FEBRUARY 1940.

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